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No. 91-1579

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LAWRENCE S. KRAIN, M.D.,
Petitioner,
vs.
RONI NADLER, MARIA LINVILLE, KEITH MONROE, KEITH MONROE, INC., and JAY B. COHN, M.D.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a litigant with a propensity for filing dozens of lawsuits in federal and state courts against judges, doctors, lawyers, social workers and others, denied due process where appellate justices do not recuse themselves prior to rendering decisions on the sufficiency of an amended complaint before the trial court, despite the fact that the litigant has filed separate unrelated lawsuits against the appellate justices?

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JURISDICTION

By decision filed on October 9, 1991, the Court of Appeal for the State of California, Fourth Appellate District, reviewed orders sustaining demurrers to various causes of action asserted by Lawrence S. Krain, M.D., reversed the orders sustaining demurrers to a number of causes of action and directed the trial court to establish a schedule for amendment of pleadings by Lawrence S. Krain. The petitioner does not allege the jurisdictional

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[1] Keith Monroe, Inc., is a professional corporation and has no parent or subsidiary companies.

grounds upon which he seeks certiorari. The only plausible ground would be 28 USC § 1257(3) which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege or immunies especially set up or claimed under the Constitution, or the treaties or statutes of, or any commission held or authority exercised under, the United States."

There is a long line of decisions of this court to the effect that the judgment of the highest court of a state reversing a judgment, order or decree of a trial court and remanding a case for further proceedings is not a final decision and cannot be reviewed by the Supreme Court. *O'Dell v. Espinoza* 456 U.S. 430 (1982); *Market Street Railway Co. v. Railroad Commission of State of California* 324 U.S. 548 (1945); *Houston v. Moore* 16 U.S. 433 (1818). One purpose of the requirement that this court review only final judgments is to prevent interference with state proceedings where the underlying dispute may otherwise be resolved. *Costarelli v. Massachusetts* 421 U.S. 193 (1975).

The Court of Appeal of the State of California is an intermediary court which remanded the case to the trial court with directions and instructions regarding petitioner's right to file amended pleadings. Petitioner has no final judgment giving rise to a right to certiorari.

STATEMENT OF THE CASE

On June 12, 1986, Lawrence Krain filed an original complaint purporting to allege eight causes of action for defamation, medical malpractice, legal malpractice, invasion of privacy, negligence, intentional infliction of emotional distress, negligent misrepresentation and breach of written contract. Krain appealed from orders of the Superior Court of County of Orange, which entered orders of dismissal after the trial court granted motions to strike and sustained demurrers without leave to amend to Krain's first amended complaint.

The Court of Appeal of the State of California is divided into six geographic districts. The Fourth Appellate District has jurisdiction over appeals from judgments rendered in the Orange County Superior Court. There are three divisions of the Fourth Appellate District. The three judge panel of Division One of District Four was assigned by the California Supreme Court to determine Krain's appeal after justices on the First Division requested a transfer. (Krain's Appendix A-34.)

Division One of the Court of Appeal rendered its written decision filed on October 9, 1991. (Krain's Appendix I at page A-1.) The Court of Appeal accepted all material facts properly pleaded as true for purposes of ruling upon the demurrer (A-2) and addressed each cause of action asserted by Krain. As to the first, second, third, sixth and seventh causes of action, the Court of Appeal directed the trial court to permit Krain to amend his complaint, but as to the fifth and eighth causes of action, the appellate court held that the trial court was correct in sustaining Monroe's general demurrer to those causes of action without leave to amend. (A-26).

Krain sought review by the California Supreme Court which review is entirely discretionary. On January 15, 1991, the Supreme Court denied Krain's petition for review. Krain now complains that he was denied due process because the justices who granted him leave to amend his pleadings did not recuse themselves.

SUMMARY OF ARGUMENT

Krain, a vexatious pro se litigant with a propensity for filing lawsuits claiming loss of rights against federal and state trial and appellate court justices, including justices of this court, cannot demonstrate loss of a right of due process. There is no question of law at issue that justifies the granting of a writ of certiorari here.

ARGUMENT

Krain admits in his petition that at the time that the Court of Appeal rendered the decision of October 19, 1991, two of the three justices in the panel had been named defendants in a suit filed by Krain. He had also sued justices sitting on another one of the three division of the Fourth Appellate District. At the time the California Supreme Court declined to grant review, three of the justices of that court had been named as defendants in suits filed by Krain, but they abstained from the decision denying review. (A-35.) In fact, the Honorable Chief Justice William Rehnquist and Associate Justices Scalia and O'Connor are also defendants in suits filed by Dr. Krain.[2] These suits are in addition to

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[2] The three justices of this Court were named in the case of *Krain v. Devich*, filed in the United States District Court for the Northern District of California as case number C90-3555-SC. The case,

(continued)

the twenty-nine civil suits filed by Krain referred to by the Court of Appeal in its opinion. (A-6 through A-10.) Petitioner's claim, that his right of due process has been violated because justices who remanded a decision *favorable* to Krain should have instead recused themselves in light of their status as defendants in litigation commenced by Krain, is not supported by law.

In *Tumey v. Ohio* 273 U.S. 510, 523 (1927), this court held, "It certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." What degree or kind of interest is sufficient to disqualify a judge from sitting "cannot be defined with precision." *In re Murchison* 349 U.S. 133, 136 (1955). In *Ward v. Village of Monroeville* 409 U.S. 57, 60 (1972), this court stated the issue is whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' " Mere allegations of bias and prejudice simply do not require disqualification of an appellate justice. Only in the most extreme cases is disqualification on the bases of prejudice constitutionally required. *Aetna Life Insurance Co. v. Lavoie* 475 U.S. 813, 821 (1986).

The justices of Division One of the Fourth Appellate District of the State of California who rendered a decision favorable to Krain were among many judges who have not been spared as victims of Krain's campaign of endless litigation that has infected even this fine court. Krain simply cannot demonstrate that justices of the

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(fn. continued)
pending in the Ninth Circuit as case number 91-15758, has been fully briefed although oral argument has not been set.

Fourth Appellate District of the State of California who instructed the trial court to let Krain amend his defective pleading have a direct personal, substantial or pecuniary interest in reaching any conclusion in the appeal before the court.

CONCLUSION

Petitioner has a well honed practice of spinning webs of litigation in which judges of federal and state courts have become caught. Mere allegations of prejudice do not require that appellate justices recuse themselves. This court does not have jurisdiction to decide the merits of Dr. Krain's claim inasmuch as there is no final judgment to be reviewed. Krain has not and cannot present any claim of denial of equal protection by appellate justices who have determined to remand a case to a state trial court with directions to permit Krain to file an amended pleading.

DATED: April 16, 1992.

Respectfully submitted,

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